

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND

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PETITION OF STEPHEN and *
PATRICIA EDELEN *
for a special exception to allow a child day care *
center for up to 24 children on property located at *
6705 Connecticut Avenue, Chevy Chase, Maryland *

Patricia and Stephen Edelen *
Leslie Caldicott *
Joseph Rubin *
Carl Starkey *
In Support of the Petition *

Anne Marie Vassallo, Esquire *
David Freishtat, Esquire *
Attorneys for the Petitioners *

Special Exception No. 10-1

* * * * * *
Maggie Zimmerman, Crossing Guard *
Montgomery County Police Department *

* * * * * *
Andy Leon Harney, Village Manager, *
Village of Chevy Chase, Section 3 *
William Brownlee, Chair of the Village Council *
Village of Chevy Chase, Section 3 *
Joseph Cutro *
David Podolsky, Esquire, *
Attorney for Village of Chevy Chase *
Section 3 *

In Opposition to the Petition *
* * * * * *
David Lublin, Mayor, Town of Chevy Chase, *
David Lamb, Judith McGuire, Clair Wolfowitz, *
Ambassador Peter Terpeluk, Tom Jones, *
Caroline Grandy, Shelley Lowenstein, Douglas *
Lowenstein, Deborah Litt, Edward Stephens *
Marc Weller, Jeffrey Benson, Terry O'Connell, *
Bob Salmon and Lanny Johnson *

In Opposition to the Petition *
* * * * * *
Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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I. STATEMENT OF THE CASE

Petition S.E. 10-1, filed on March 19, 2010, requested a special exception to operate a child day care center for up to 24 children.¹ The facility would be located in Petitioners' existing single-family, detached home at 6705 Connecticut Avenue in Chevy Chase, Maryland, in the R-60 Zone. Petitioners also seek waivers of the required drive-way width and parking setbacks.

Petitioners, Patricia and Stephen Edelen, have been operating a licensed family day care home ("Chevy Chase Reggio") for up to 8 children on the site since 2008. Exhibit 22(a). A family day care home does not require a special exception in the R-60 Zone, but a special exception is required to operate a child day care center in the R-60 Zone, pursuant to Zoning Ordinance §59-C-1.31(d).

¹ A "child day care center" is one of three types of "child day care facilities" defined in Zoning Ordinance §59-A-2.1. The other two are "family day care homes" for up to 8 children and "group day care homes" for up to 12 children. A "child day care center" is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
 - 1) for 13 or more children, or;
 - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
 - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. The case was originally scheduled for a hearing on July 23, 2010, but it was postponed by the Hearing Examiner, by notice dated July 13, 2010, until October 1, 2010. Exhibit 26.

The petition engendered five pre-hearing letters of support from the community (Exhibits 17, 18, 19, 22(q) and 28) and thirteen pre-hearing letters in opposition from the community (Exhibits 15, 21, 24(a), 25, 29, 30, 31, 33, 34 and 36 to 39).² Among the opposition letters were submissions from three incorporated municipalities – the Village of Chevy Chase, Section 3, the town in which the subject site is located (Exhibit 24(a)); Chevy Chase Village, a neighboring jurisdiction to the south (Exhibit 25); and the Town of Chevy Chase, a neighboring jurisdiction to the west (Exhibit 21).

The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated June 15, 2010, recommended approval with conditions (Exhibit 20).³ The Montgomery County Planning Board (“Planning Board”) voted three to one on July 1, 2010, to recommend approval, with the conditions suggested by the Technical Staff, plus a recommendation “that the Hearing Examiner conduct a follow-up hearing nine months after approval of the special exception to assess whether there have been adverse traffic effects sufficient to warrant a change in the conditions of approval such as reducing the number of children.” Letter of July 6, 2010 (Exhibit 23). This additional recommendation was, in the words of the Planning Board, “[b]ased on uncertainty as to whether the subject site can support the proposed 24-child day care center without undue adverse effects on local streets . . .” Exhibit 23.

The hearing was convened, as scheduled, on October 1, 2010, and Petitioners, who were represented by counsel, presented testimony from five witnesses, consisting of themselves, two

² Some additional opposition letters were attached to the Technical Staff report (Exhibit 20), and still more letters were filed at the hearing.

³ The Technical Staff report is frequently quoted and paraphrased herein.

community members, and a transportation planner, Carl Starkey. A local crossing guard, employed by the County police, also testified as to her observations of traffic in the area. The opposition was led by the Village of Chevy Chase, Section III (VCC-3), which was also represented by counsel. In addition to two representatives of that municipality (the Village Manager and the Chair of the Village Council), VCC-3 called a transportation expert, Joseph Cutro, to testify. Sixteen members of the community also testified in opposition, including the Mayor of the Town of Chevy Chase. The hearing could not be completed in one day, so it was reconvened and completed on October 4, 2010.⁴

The record was held open until October 25, 2010, to allow the Petitioners time to submit a revised Statement of Operations and a revised Site Plan, and to permit commentary by Technical Staff and interested parties. The opposition was also given the opportunity to submit proposed conditions, which were to be considered if the special exception were granted over their continuing opposition. Petitioners timely filed their revisions (Exhibit 75), and the opposition timely commented (Exhibit 76). After Petitioners' reply, the record closed as scheduled on October 25, 2010.

Based on a careful review of the entire record and for reasons that will be discussed more fully below, the Hearing Examiner concludes that the special exception must be denied because the unusual characteristics of the site would create non-inherent adverse effects, and those effects would represent a significant danger to users and the community if the special exception were granted. The Hearing Examiner also concludes that he does not have the legal authority to grant the requested waivers regarding parking setbacks and drive aisle widths.

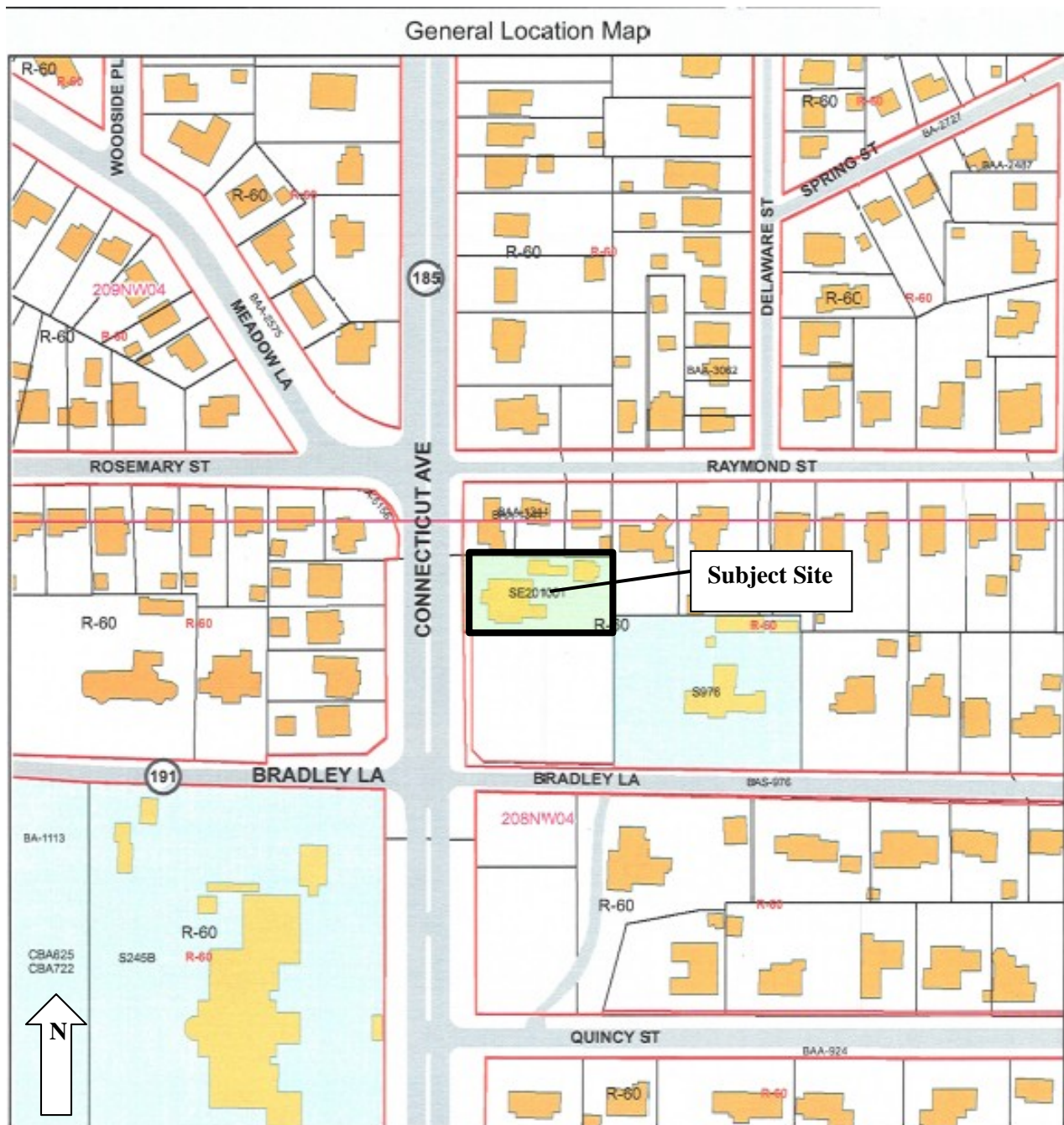
II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The proposed child day care center would operate in an existing, single-family, detached,

⁴ References to the hearing transcript on October 1, 2010, will be in the format 10/1/10 Tr. xx, and references to the October 4 transcript will be made in the format 10/4/10 Tr. xx.

three-story home, at 6705 Connecticut Avenue, Chevy Chase Maryland. It is located on the east side of Connecticut Avenue between Bradley Lane and Raymond Street. The property's legal description is Lot 4, Block 2 in Section 3 of the Village of Chevy Chase. The property is zoned R-60, and according to Technical Staff, is 21,780 square feet in size. Exhibit 20, p. 3. The location of the site can be clearly seen on the General Location Map provided by Staff as Attachment 1 to their report:



Technical Staff describes the site as follows (Exhibit 20, p. 3):

. . . The property has approximately 104 feet of street frontage along Connecticut Avenue. The property is improved with a three-story masonry dwelling with a basement, constructed in 1977. The dwelling is setback approximately 32 feet from Connecticut Avenue. The dwelling has a left side yard of approximately 30 feet, a right side yard of approximately 19 feet and a rear yard of approximately 90 feet.

The property is accessed via a 20-foot wide asphalt driveway from Connecticut Avenue. The 105-foot long driveway provides access to the two-car detached garage that is located approximately 5 feet from the left side lot line. The existing driveway and large parking area provide parking for at least nine vehicles. . . .

The property is relatively flat in the front and rear yards. Both the front and rear yards are landscaped with mature trees, shrubs and flowers. There is a mature row of evergreen screening along Connecticut Avenue and a row of evergreen trees inside the property's northern fence line. The perimeter of the dwelling is screened and entirely enclosed, with an existing masonry wall along Connecticut Avenue and an existing six-foot high fence along the remaining boundaries. The rear yard of the property is fenced and includes a 667 square-foot guest house, a storage shed, a flagstone patio, and a grass covered play area and playground that consists of approximately 7,120 square feet.

Petitioners' home, which can be seen below, contains 10,900 square feet of floor area. Exhibit

70(a). The subject site is depicted in photographs supplied by the Petitioners (Exhibits 6):

1. Outside View—Driveway Entrance



2. Inside View—Driveway Entrance



3. Outside View—Screening Along Street



4. Inside View—Screening of Parking Area #1



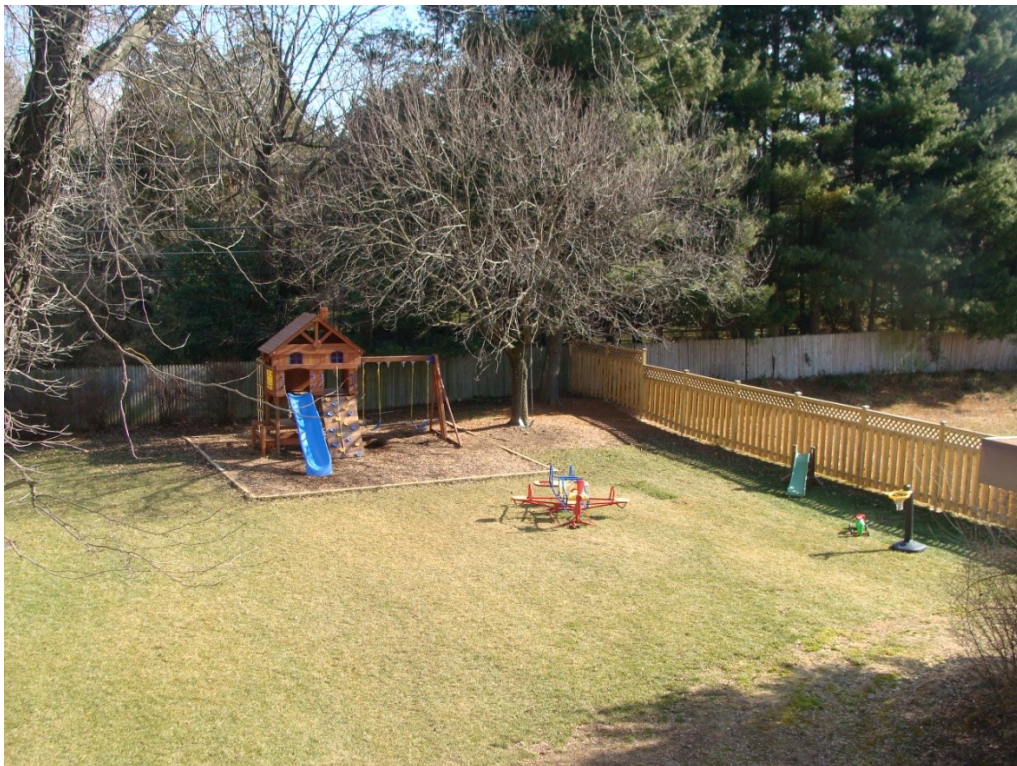
5. Parking Area #1



6. Entrance to Day Care—Rear of House, Not Visible from Street



7. Playground Area—South East Corner, Fenced In



8. Playground Area—North East Corner, Fenced In

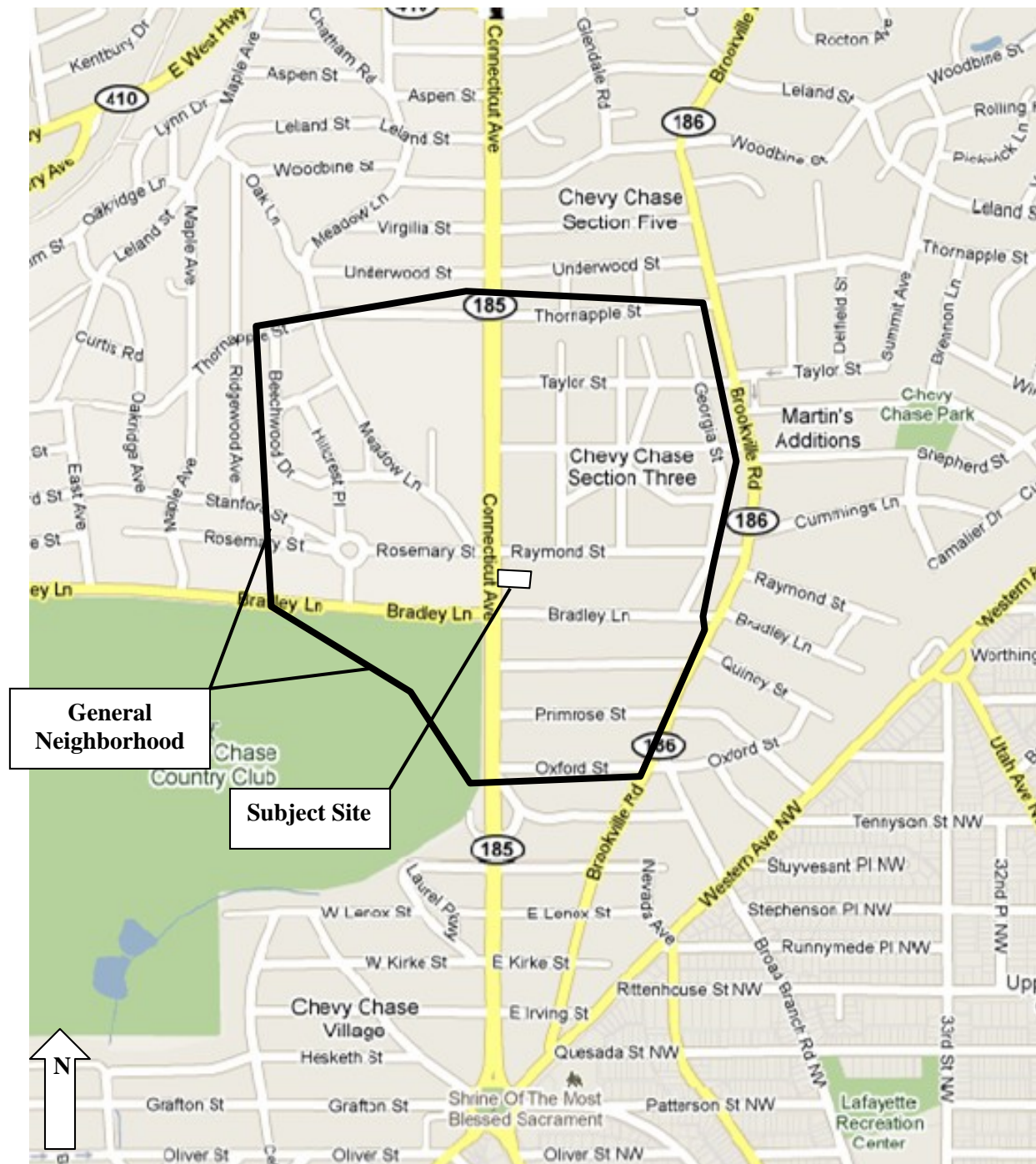


Technical Staff proposed to define the general neighborhood as bordered by Shepherd Street to the north, Delaware Street to the east, Bradley Lane to the south, and Connecticut Avenue to the west. Staff describes the neighborhood as follows (Exhibit 20, pp. 3-4):

The neighborhood is zoned R-60 for single-family residences. Single-family homes are located directly across Connecticut Avenue, and the Chevy Chase Country Club is situated diagonally south across Connecticut Avenue. Abutting the subject property to the south are two vacant properties. To the east of the property and separated by trees and foliage are single-family homes. To the north, fencing and landscaping separate the subject dwelling, existing garage, and guest house from the abutting single-family homes that front onto either Connecticut Avenue or Raymond Street. There are no similar special exceptions within the neighborhood. A special exception for an accessory apartment was approved in 1984 at 3815 Bradley Lane.

The Hearing Examiner finds that Technical Staff's recommended definition of the general neighborhood is too narrow, since impacts from the special exception would be felt on Connecticut

Avenue, as well as on the confronting homes west of Connecticut, and on nearby streets. The neighborhood, as redefined by the Hearing Examiner is depicted below:⁵



⁵ The record did not include a good map of the entire neighborhood that could be easily reproduced in legible form. The Hearing Examiner has therefore used a Google map of the area, of which he takes official notice.

The defined neighborhood is bordered on the north by Thornapple Street, on the east by Brookville Road, on the south by Oxford Street and on the west by Beechwood Drive and the Chevy Chase Country Club. It thus encompasses not only all of Section 3 of the Village of Chevy Chase, but also portions of the Town of Chevy Chase (the area west of Connecticut Avenue) and Chevy Chase Village (the area south of Bradley Lane).

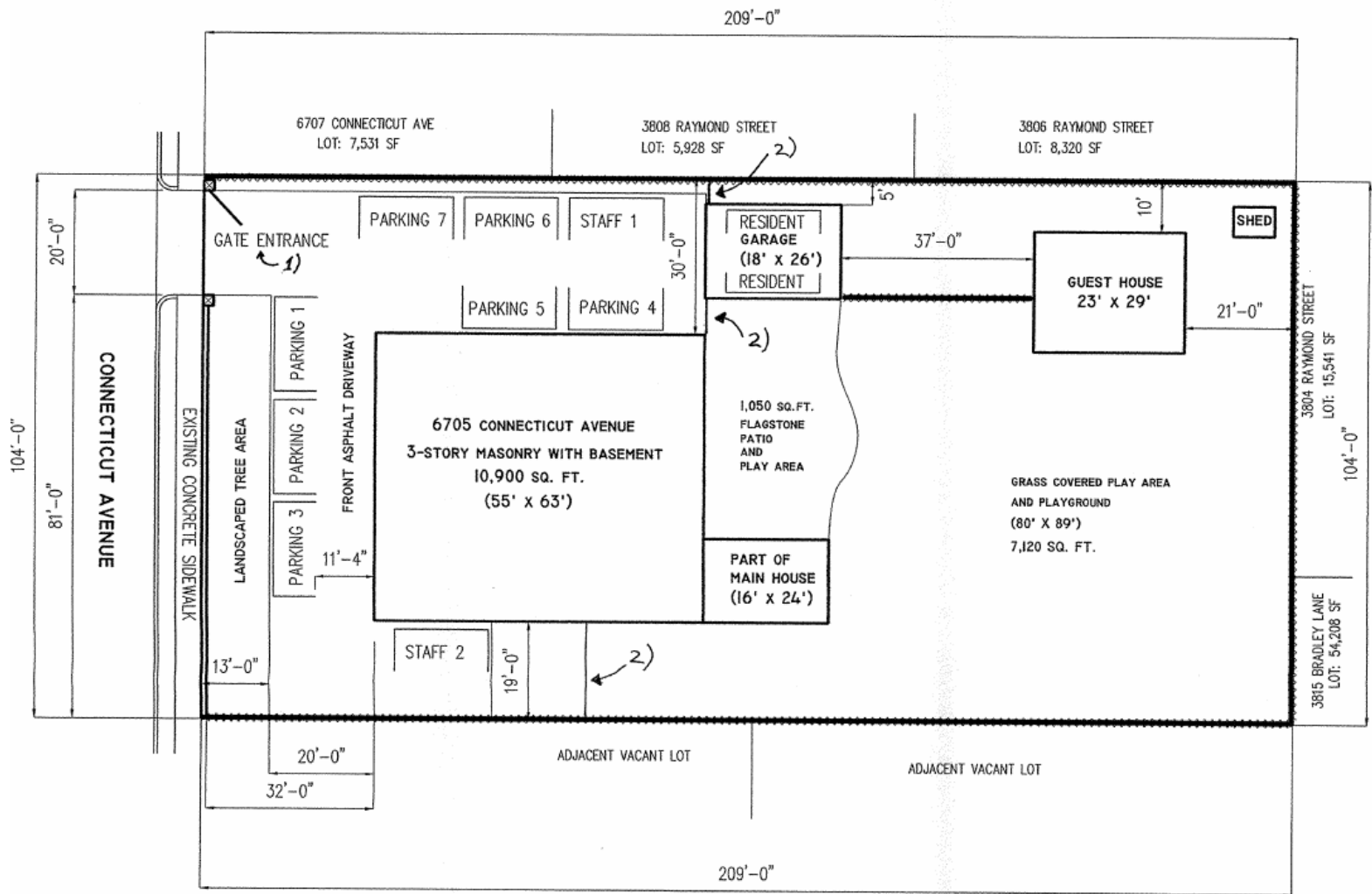
Two significant factors about the neighborhood, not mentioned in Technical Staff's brief neighborhood description, received a great deal of attention during the hearing – most of the side streets in Section 3 of the Village of Chevy Chase are very narrow (*i.e.*, 16 feet wide), and the lanes on Connecticut Avenue, northbound, adjacent to the site, are only nine feet wide, which is very substandard. 10/1/10 Tr. 83-84, 189, 260 -262 and 323 ; 10/4/10 Tr. 14-15, 21-22; and Staff Report, Attachment 8 (pp. 3 and 6). The impact of these factors will be discussed later in this Opinion.

B. The Proposed Use, Landscaping, Lighting, Signage and the Environment

Petitioner proposes to expand the existing “family day care home” for up to 8 children into a “child day care center” for up to 24 children, ages two to four. The proposed child day care will provide daily, weekday care throughout the year, and the 24 children will consist of 18 children attending full days and 6 children attending on a half-day basis. The day care will be located on the basement level of the existing home. Technical Staff reports that approximately 1,500 square feet of the home will be used for activities and play area for the children. Exhibit 20, p. 4. The front entrance of the dwelling will be used by parents when picking up and dropping off their children.

The staff will consist of the two petitioners and two non-resident employees, who will begin working at the site if the special exception is granted and a license is issued to increase the number of children from 8 to 24. The employees will work from 7:45 a.m. to 5:45 p.m.

Petitioners submitted a revised site plan (Exhibit 75(a)), which is reproduced on the next page:



Notes:

- Existing entrance gate can be modified to remove post separating pedestrian access portion from vehicular access portion such that both gates can be opened to allow vehicular access, or gates may be replaced with a single sliding gate. A gate or gates as indicated should remain for safety and security.
- Two existing pedestrian gates for security are shown on either side of the Garage and an existing fence for security is shown on south side of property approximately 18 feet east of parking space Staff #2.

LEGEND

	8' X 18' PARKING SPACE
	EXISTING SOLID MASONRY WALL
	FENCE

"SITE PLAN WITH PARKING LAYOUT"

Building	3-story Masonry with Basement 10,900 sq. ft.	
Lot Size	21,780 sq. ft.	
Address	6705 Connecticut Avenue Chevy Chase, MD 20815	
Legal Description	Lot 4, Block 2	
Existing Use	Family Home Day Care	
Proposed Use	Child Day Care Center for 24 children	
Parking	Required	Provided
Parents of Children	4	7
Non-Resident Staff	2	2
Resident Staff (in Garage)	2	2
Total	8	11

As can be seen on the Site Plan depicted on page 13, Petitioners propose to have the non-resident staff and parents park along the on-site drive aisles. A total of two non-resident staff spaces and seven parents' spaces are depicted. There is also a garage which will accommodate Petitioners' two vehicles. The problems with the proposed parking arrangement will be discussed later in this Opinion.

Petitioners currently possess a State license to operate a Family Day Care Home for up to eight children (Attachment 6 to the staff Report, Exhibit 20). They will apply to amend their license to permit them to provide services for up to 24 children if this special exception is granted. 10/1/10 Tr. 30. As required under Code § 59-G-2.13.1(a)(4), the Petitioners have submitted an affidavit affirming that they will comply with all applicable State and County requirements (Exhibit 40).

Petitioners also submitted a Statement of Operations (Exhibit 75(c)), which is reproduced below:

STATEMENT OF OPERATIONS

A. Hours and Days of Operations

1. Child care from 7:45 am to 6:30 pm Monday through Friday

B. Child Care Enrollment

1. Eighteen (18) full-day children
2. Six (6) half-day children

C. Holiday Closings

1. Child care closed on all Federal holidays and during the period between Christmas and New Years annually

D. Special Events

1. Maximum of six (6) Saturday Enrollment Open Houses per year, 10 am to 2 pm for prospective parents to tour the day care
2. Maximum of three (3) Parents' Nights per year, 6:30 pm to 8:30 pm for the parents of enrolled children to visit the day care

Note: All outdoor parking spaces shown on the Site Plan will be available during Special Events and parking is allowed on Connecticut Avenue in front of the residence at those times.

E. Staffing

1. Four (4) full-time staff
 - a. Two (2) Resident staff
 - i) Resident staff hours: 7:45 am to 6:30 pm
 - b. Two (2) Non-resident staff
 - i) Non-resident staff #1 hours: 7:45 am to 5:45 pm
 - ii) Non-resident Staff #2 hours: 9:00 am to 5:00 pm

F. Outdoor Activities

1. No more than twelve (12) day care children outside in backyard at one time
 - a. Group 1 (12 day care children) anticipated playtimes: 10:00 am to 11:00 am; 4:00 pm to 4:30 pm
 - b. Group 2 (12 day care children) anticipated playtimes: 11:00 am to 12:00 pm; 4:30 pm to 5:00 pm

Note: Duration of outdoor activities will not exceed times indicated, but exact times may vary depending on weather circumstances.

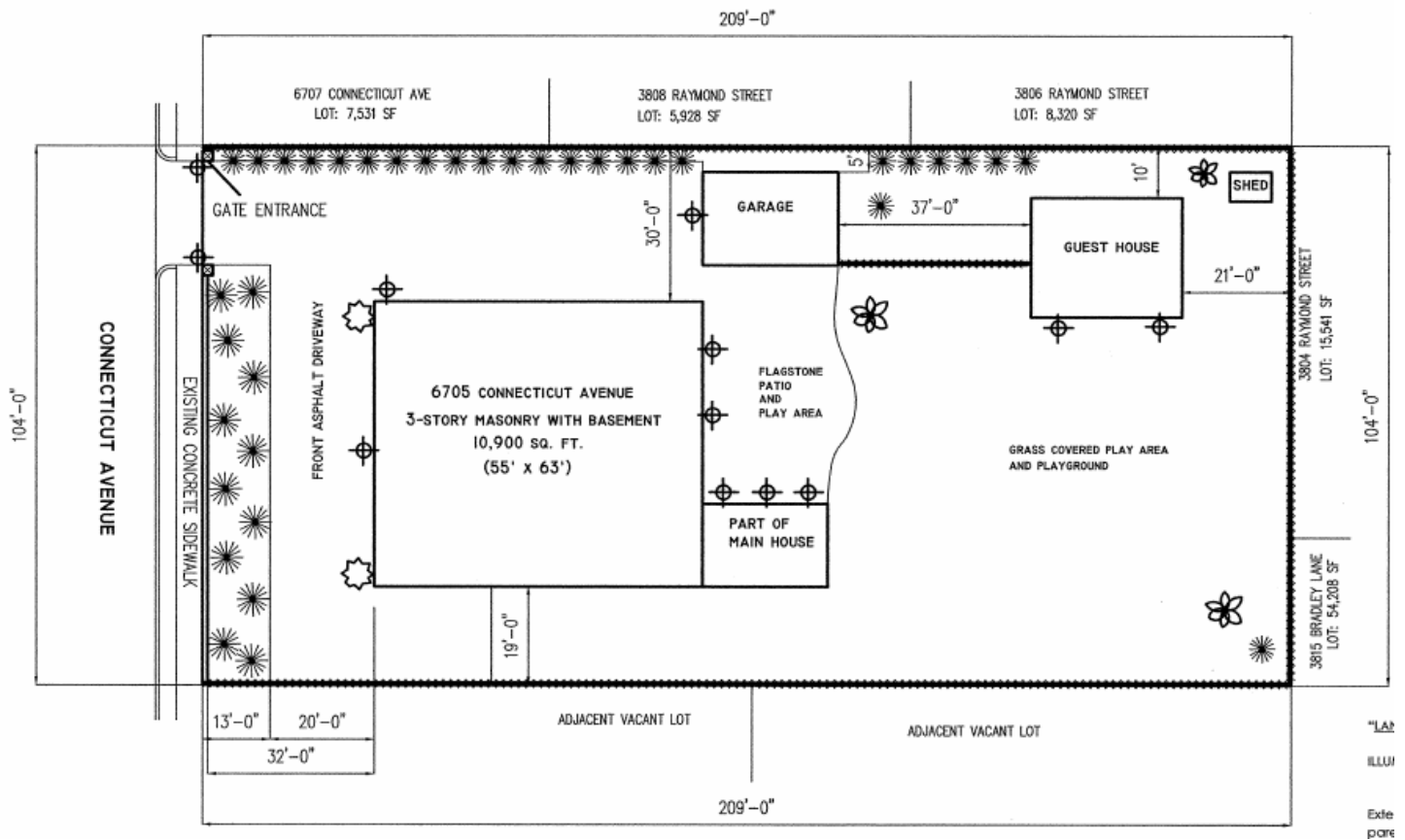
2. Maximum of four (4) annual events, lasting not more than two (2) hours, during which all children may be outside at the same time, such as Easter or Halloween events
3. Monthly fire drills, as required by Montgomery County Fire and Rescue Service, during which all children will be outside simultaneously

G. Parking

1. Parking spaces indicated on Site Plan
2. Eleven (11) total parking spaces provided; of which four (4) are reserved for Staff
 - a. Resident Staff Parking: Two (2) garage spaces
 - b. Non-resident Staff Parking: Two (2) staff spaces marked #1 and #2
 - c. Seven (7) parent parking spaces provided
3. Parents are assigned to the following Parking Groups for arrival and departure:
 - a. Group A: 9 full-day children (of 18 total full-day children)
 - i. Arrival from 7:45 am to 8:30 am
 - ii. Departure from 5:45 pm to 6:30 pm
 - b. Group B: 9 full-day children (of 18 total full-day children)
 - i. Arrival from 8:30 am to 9:15 am
 - ii. Departure from 5:00 pm to 5:45 pm
 - c. Group C: 6 half-day children (of 6 total half-day children)
 - i. Arrival from 9:15 am to 10:00 am
 - ii. Departure from 12:15 pm to 1:00 pm
4. Parents arriving outside assigned parking window group will be fined \$25.00 per incident, except in cases of emergencies
5. Parents may arrive to pick-up children between 1:00 pm and 5:00 pm due to child illness, medical appointment or other early dismissal needs

Petitioners have provided a Landscape and Lighting Plan (Exhibit 5) showing the location of existing trees and other vegetation on the site, as well as the existing lighting fixtures. No lighting will be added to the exterior of the home; nor will there be any other changes made to the exterior, unless required by reviewing officials. It will therefore retain its residential appearance.

The Landscape and Lighting Plan is shown below and on the following page:



LEGEND

	EVERGREEN TREE
	DECIDUOUS TREE
	15' BUSH
	EXTERIOR LIGHTING
	FENCE

"LANDSCAPING AND LIGHTING PLAN"

ILLUMINATION

Exterior illumination consists of residential-character fixtures to provide safety for cars, parents, and children entering and exiting the lot without causing glare to surrounding properties. There are a) two 16-watt fluorescent lamps mounted on masonry posts at the gated entrance of the lot, b) 30 6-watt LED pathway lights mounted on stakes along the brick curb of the front driveway to guide cars and pedestrians, c) a large hanging chandelier with 8 25-watt bulbs to illuminate the front porch of house, d) two 60-watt flood lights to illuminate the front, north corner of the house and the driveway leading to the garage, e) a residential, night sensor lamp with two 16-watt fluorescent bulbs mounted above the garage door, f) one 60-watt doorway lamp next to rear doorway of house, g) one 60-watt doorway lamp in the stairwell above the entrance to day care, h) three 16-watt fluorescent recessed lights under the eaves of house to illuminate flagstone patio, and i) two 16-watt fluorescent motion sensor lights mounted at south corners of Guest House to illuminate playground at dusk

TREES

No additional tree planting is proposed. The western side of lot fronting Connecticut Avenue is heavily screened with 12 Leyland Cypress evergreen trees which are 15-18 feet in height. The north side of lot has 20 Arborvitae trees running along driveway next to existing fence. An additional row of Leyland Cypress trees run along the north side of lot between the Garage and Guest House to screen play area from neighboring lots. The lot also features several mature deciduous and pine trees in varying heights from 30 to 45'. Please note that neighboring properties also have mature trees running along north and eastern property lines which provide further screening of play areas.

LANDSCAPING

No additional landscaping is proposed. Subject property is landscaped with 7,100 sq. ft. lawn featuring Maryland tall fescue grass, and a variety of mature deciduous and evergreen bushes.

FENCING

Subject property is entirely enclosed with no-sight fencing and masonry walls. The front of the lot along Connecticut Avenue features a white masonry wall running in front of the row of evergreen trees, the south side of lot features a 6 foot high shadow-box fence, and a 6 foot high stockade fence runs along the north and rear property lines.

Technical Staff described the landscaping and lighting as follows (Exhibit 20, pp. 11-12):

As previously noted, both the front and rear yards are landscaped with mature trees, shrubs and flowers. There is a mature row of evergreen screening along Connecticut Avenue and a row of evergreen trees inside the property's northern fence line. The perimeter of the dwelling is screened and entirely enclosed, with an existing masonry wall along Connecticut Avenue and an existing six-foot high fence along the remaining boundaries.

There are no additional external lighting changes proposed. The existing exterior illumination consists of residential type fixtures that provide safety for cars, parents, and children entering and exiting the property. There are two 16-watt fluorescent lamps located at the gated entrance, a hanging chandelier to illuminate the front porch, two motion sensor flood lights to illuminate the north corner of the dwelling and the driveway leading up to the garage, two 16-watt lamps located on the garage, one 60-watt light over the rear doorway, three 16-watt fluorescent lights under the eaves of the dwelling to illuminate the patio, and two 16-watt motion sensors lights mounted at the south corner of the guest house. The lighting currently in place does not cause any glare onto adjoining properties.

As is evident both from the photographs reproduced on pages 6 through 10 of this Opinion and from Technical Staff's evaluation, the existing landscaping provides adequate screening for this site. Staff also indicates that the lighting currently in place "does not cause any glare onto adjoining properties," and that "no additional external lighting changes proposed." Exhibit 20, pp. 11-12.

Petitioners supplied a photograph (as part of Exhibit 6) of the existing, non-illuminated, aluminum sign, which measures 36 inches wide by 24 inches high. Although it is currently down for repairs, Petitioners intend to keep the sign. 10/1/10 Tr. 125-127. It is depicted below:



Zoning Ordinance §59-F-4.2 provides that, “the total area of all permanent signs on a lot or parcel in a residential zone must not exceed 2 square feet, unless additional area is permitted pursuant to this ordinance.” Petitioner would thus require a sign variance from the Department of Permitting Services (DPS) in order to post the desired signage, pursuant to Zoning Ordinance §59-F-12.1. No sign may be posted unless and until Petitioner obtains a permit therefor and a sign variance, if required, and copies of those documents would have to be filed with this office if the special exception were granted.

There are no environmental issues in this case because there are no planned exterior changes. Environmental Planning Staff noted that the site is exempt from forest conservation laws, per Code Section 22A-4(b), because it involves a petition for a special exception on a tract of land less than 40,000 square feet. Exhibit 20, Attachment 9. Environmental Planning Staff also found that “the visual and sound barriers along the rear property line [are] sufficient, together with the staggered play times as proposed.” Exhibit 20, Attachment 9, p. 2.

C. Master Plan Conformance and Compatibility with the Neighborhood

The subject site is within the area covered by the Bethesda Chevy Chase Master Plan, approved and adopted in April 1990. The Master Plan, at pages 31-33, establishes five guidelines for reviewing special exceptions. The guidelines are to:

1. Avoid excessive concentration of special exception and other nonresidential land uses along major highway corridors.
2. Avoid over-concentration of commercial service or office-type special exception uses in residential communities.
3. Protect major highway corridors and residential communities from incompatible design of special exception uses.
4. Support special exception uses that contribute to the housing objectives of the master plan.
5. Support special exception uses that contribute to the service and health objectives of the Master Plan.

Technical Staff referred to the first four of these guidelines, but not the fifth. This omission is rather odd because, directly under Guideline 5, the Master Plan references child care facilities, stating, “In general, the Plan endorses provision of child day care” Master Plan, p. 33.

Section 6.22 of the Master Plan directly addresses child care in the Bethesda-Chevy Chase area and expressly encourages the small child care centers in pre-existing dwelling units. As stated on page 155:

By utilizing existing dwelling units, they require minimal additional capital investment to provide services. The family day care homes are currently permitted and development of small centers should be encouraged.

Technical Staff observes that the existing dwelling can accommodate the additional 16 children proposed by the Petitioners without any new construction, and there are no existing special exceptions within close proximity to the proposed use. Exhibit 20, p. 5. Staff therefore found that the proposed use will not create an excessive concentration of special exceptions, and existing compatibility with the neighborhood will be retained.

The Hearing Examiner agrees. The use of existing homes to provide small day care centers is clearly consistent with the objectives and recommendations of the Bethesda Chevy Chase Master Plan.

D. Transportation, Parking, Safety and Waiver Issues

There are four general areas that must be addressed regarding transportation issues in this case – the adequacy of transportation facilities under Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR); the parking plan and the potential for overflow parking on extremely narrow area streets; the potential impact upon vehicular and pedestrian safety if the special exception were approved; and the request for waivers relating to the parking setbacks and drive-aisle widths. The safety issue is by far the most problematic, based on the evidence in this case.

1. Adequacy of Transportation Facilities under LATR and PAMR:

The impact on transportation facilities from the proposed expansion of the day care use from 8 to 24 children was the subject of a great deal of concern expressed by members of the community at the hearing. However, we begin with the traditional measures used by the County in assessing the adequacy of transportation facilities – Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR).

Petitioners’ traffic expert, Carl Starkey, submitted a “traffic brief” (Exhibit 22(m)), in which he concluded that because of the small number of new trips that would be generated, both LATR and PAMR were satisfied without the need for a full traffic study.

Technical Staff reviewed this issue, as well, and made the following findings (Exhibit 20, p. 8):

The increase in peak-hour trips generated as a result of the additional 18 children during the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.) is shown in the table below. The trip-generation rates in the *Local Area Transportation Review and Policy Area Mobility Review Guidelines* are based on a minimum threshold of six employees. Therefore, the Institute of Transportation Engineers’ (ITE) *Trip Generation Report* was used to estimate the peak-hour trips generated by this child daycare facility that has only four employees. The total trips include the new, diverted, and pass-by trips. Pass-by and diverted trips are those trips that are already on the road and drop-off/pick-up their children at the subject site on their way from other origins or destinations.

Peak-Hour trips	Weekday Peak Hour	
	Morning	Evening
Existing	10	10
Expanded	10*	4*
Total	20	14
Pass-by & Diverted	18	13
Net New	2	1

* Six children are proposed to be in a half-day program that ends at noon.

Although the expanded child daycare facility would result in doubling the total number of morning peak-hour trips, 80% of these vehicular trips are diverted or pass-by trips. Thus, the additional new trips would be less than three and considered to be a de minimis traffic impact under the *Growth Policy* standards.

Transportation Staff noted that because the new use would generate fewer than 30 peak-hour trips, a traffic study is not required under Local Area Transportation Review (LATR), and because fewer than 3 new peak-hour trips would be generated, mitigation is not required under Policy Area Mobility Review (PAMR). Exhibit 20, Attachment 8. Thus, despite the concerns of the community about safety and the impacts of possible overflow parking on narrow local streets, it is clear that the proposal for an expanded use would satisfy LATR and PAMR and would not have a serious impact on overall road capacity, as traditionally measured by the County.

2. The Parking Plan and the Potential for Overflow Parking on Extremely Narrow Area Streets:

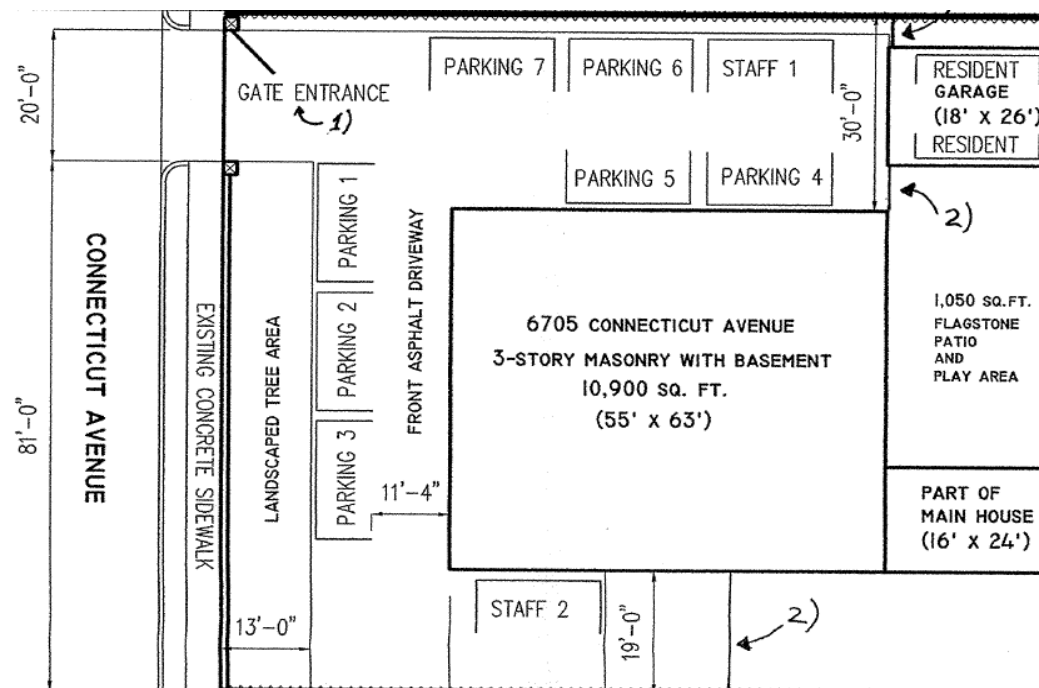
Zoning Ordinance §59-E-3.7, provides that a child day care center must provide one space for every non-resident staff member in addition to the parking required for the residence, plus adequate parking for discharge and pick up of children. The Code provides that the average drop off and pick up space required is one space for every six children, although waivers and variances are allowed in accordance with the Zoning Ordinance.

Technical Staff calculated that a child day care facility for 24 children must provide a minimum of 8 parking spaces: one space for each of the two non-resident staff members, two spaces for the residence, and four spaces for the children's parents. Exhibit 20, p. 10. Petitioners' revised site plan (Exhibit 75(a)), reproduced on page 13 of this Opinion, ostensibly provides eleven parking spaces, two of which are marked for staff, seven of which are marked for "parking" (*i.e.*, parents' parking), and two of which are located in the garage for the residents.

The Hearing Examiner uses the word "ostensibly" in describing the number of marked spaces because the evidence (and common sense) indicates that a number of them will be almost unusable given their placement within the on-site drive aisles. Technical Staff informs us that the width of a typical passenger car is 7 feet, according to the American Association of State Highway

and Transportation Officials (AASHTO), but many vehicles in common use today, such as SUVs and minivans, are bulkier. As observed by Shelley Lowenstein, who lives directly across Connecticut Avenue from the Edelens, “it’s really hard to imagine how nine cars could negotiate, especially when they are SUVs, on this site at the same time.” 10/1/10 Tr. 215.

Especially troubling is the proposed parking on the northern drive aisle, in which parking spaces are placed on both sides of a 30 foot wide area, and the proposed parking is stacked three deep on one side and two deep on the other, plus one perpendicular space (Parking 1) intruding into the western side of the northern drive aisle, as shown below (Parking portion of Exhibit 75(a)):



As testified to by Joseph Cutro, an expert in transportation planning and traffic engineering called by the opposition (10/1/10 Tr. 345-346):

... parking spaces 1 and 7 I believe to be untenable. They are both too close to the gate, A, and also B, we talked about the need to do three-point turns and things like that to make some of the other spaces viable. So, that gap between 1 and 7 is prohibitively small, and it certainly isn't going to allow a lot of turning movement. I don't believe, I don't believe those two are going to work. And, in fact, I'm a little disappointed that they weren't stricken at the planning stage.

I also believe that parking space 4, while, while technically viable is a little bit dicey because the only way, the only way it's going to be usable, particularly if, particularly, only if parking, if parking space 5 is filled, then the only way into that parking space 4 is you're going to have to be able to back into it, which is going to require that three-point turn . . .

Mr. Cutro added (10/1/10 Tr. 348-349):

Everything would . . . require backing either before or after parking.

MR. GROSSMAN: And is that a problem?

THE WITNESS: Yes. As Mr. Podolsky, I think, was trying to suggest, backing in the environment of, you know, having a lot of pedestrians, particularly children in (indiscernible) it's not a good -- it's not a good combination.

The Hearing Examiner does not see how anyone could get out of parking space numbered 4, if the one numbered 5 were filled, and getting out of the space labeled 6 would be difficult, if not impossible. All the cars parked in the northern drive aisle would have to maneuver backing up while other cars are trying to enter the facility. This arrangement appears to be unworkable, and will necessarily result in backups in the drive aisle while people try to extricate themselves. The fact that cars parked in the northern aisle will not have the room between them suggested by the revised site plan is illustrated by a photograph taken by Ms. Lowenstein from across Connecticut Avenue (Exhibit 53(a)):



The photograph shows two cars parked parallel to each other in the northern aisle. There is little space between them, probably because people tend not to park too close to walls.

Both the Village of Chevy Chase Section 3 (Exhibit 76) and the Town of Chevy Chase (Exhibit 77(b)) asked, *inter alia*, that parking spaces 1, 4, 5 and 7 be eliminated if this special exception is approved, in order to reduce this parking crunch problem. The problem with doing so is that it would reduce the number of on-site parking spaces to seven, which is below the number statutorily required.

Other suggestions were to eliminate the pedestrian gate, which Petitioners have agreed to do (Exhibit 78); to require a separate pedestrian entrance away from the driveway; to require a second driveway entrance at the south end of the property, which Petitioners have not agreed to (10/1/10 Tr. 167-170); and to have an employee outside during drop-off and pickup times to monitor the situation. The gate modification and additional driveway suggestions will be discussed in the next section in connection with the safety issues. The Hearing Examiner finds that eliminating parking spaces marked 4, 5 and 7, and having an employee monitor parking would help, but would leave the site with the minimum amount of parking required and thus might create the on-street parking problem feared by the local residents.

The on-street parking problem is a concern in this neighborhood because most of the local streets are so narrow (16 feet wide with parking on one side). The 16 foot width of the local streets, though not addressed directly by Technical Staff in the body of its report, was mentioned in the Transportation Staff Memo appended to the Staff Report as Attachment 8 (p. 3):

The site is located in the southwest corner of the “Section 3 of the Village of Chevy Chase”. The roadways within the Village are the narrowest in Montgomery County with only 16 feet of paved roadway. In addition, parking is permitted on one side of the Village’s two-way roadways and results in having only one through travel lane when parked vehicles are present. School buses serving the Rosemary Hill Elementary School, Chevy Chase Elementary School, Pyle Middle School, and

Bethesda/Chevy Chase High School must travel some of the Village's narrow roadways to pick-up and drop-off children. The narrowness of those roadways tends to discourage *[sic]* non-local traffic from regularly using the Village's east-west streets to cut-through between Connecticut Avenue and Brookville Road.

A photograph of Raymond Street (Exhibit 66), just north of the site, produced by Andy Leon Harney, the Village Manager of the Village of Chevy Chase, Section 3, illustrates the point:



Ms. Harney noted that “if there is a car parked opposite your driveway, you cannot get out.” 10/4/10 Tr. 19. If a utility company is coming, she has to email everybody on the street to ask them not to park on the street, because the utility trucks cannot pass a car parked on the street. 10/4/10 Tr. 21. The fear of Ms. Harney and some residents who live on Raymond Street, is that overflow parking from the site will end up on Raymond Street, which is adjacent to the site. Although it is not a practical solution for parents, “that doesn't mean that people aren't going to do it.” 10/4/10 Tr. 42.

Considering the site conditions regarding parking, discussed above, the Hearing Examiner finds that the fear of overflow parking is a legitimate concern of the community and more specifically the residents of Raymond Street. Nevertheless, given the fact that only eight on-site

parking spaces are required by the Code, the Hearing Examiner would be willing to conditionally approve the special exception containing only eight parking spaces, with a follow-up review as suggested by the Planning Board, if it were not for the safety issue discussed in the next section.

3. The Potential Impact Upon Vehicular and Pedestrian Safety:

As mentioned above, the potential impact of this proposed use on vehicular and pedestrian safety is the Hearing Examiner's chief concern. This concern was well highlighted by the testimony of David Lublin, the Mayor of the Town of Chevy Chase, which is located directly across Connecticut Avenue from the subject site (10/1/10 Tr. 72-73):

We have two major concerns about the request related to traffic and pedestrian safety.

First, the project plan has only one entrance to the facility, and that is on Connecticut Avenue, an extremely congested and busy main thoroughfare.

Given the large number of parking spaces on a small property, and the number of cars picking up and dropping off children, it is inevitable that traffic will back up and block Connecticut Avenue or Bradley Lane.

Based on our review of the plan, it is difficult to conceive of how cars will get onto the property to pick up children, and get off the property again without having to back out onto Connecticut Avenue.

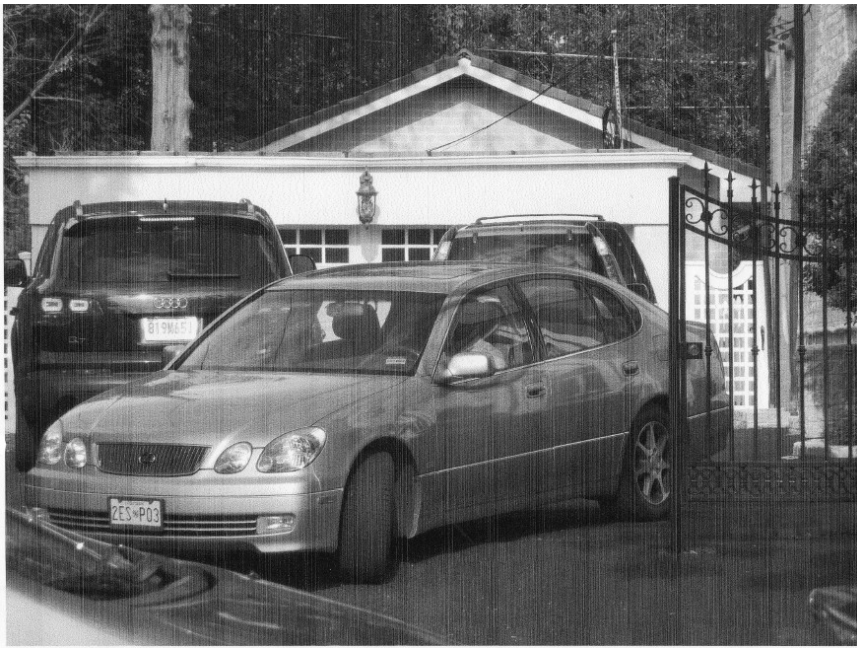
Also, cars waiting to enter the property will be sitting or queuing on Connecticut Avenue. This increased traffic will be disruptive to an already over-burdened traffic situation in that area.

Second, the crossing at Rosemary/Raymond Streets and Connecticut Avenue is used by many school children during the morning rush hour when the center proposes to have children dropped off as well. We are concerned that increased traffic in that block could create additional hazards for children walking to Chevy Chase Elementary School, which I should explain, is located in the Town of Chevy Chase.

The excellent report submitted by Chevy Chase section 3 highlights the traffic problems that would be created by the proposed expansion of the daycare facility. We do not think that the proposed staging of drop offs and pickups adequately addresses these problems, nor do we think that they are properly addressed in the report by the Planning Department staff.

The Technical Staff report referenced by Mayor Lublin had concluded (Exhibit 20, p. 16), the application satisfies transportation related requirements and will not reduce the safety of vehicular or pedestrian traffic because the existing driveway and parking area is large enough to accommodate the drop-off and pick-up of children. The applicant will also stagger arrivals and departures.

The Hearing Examiner finds that Staff's conclusion is not supported by the evidence presented at the hearing. We begin with some of the photographic evidence presented by the Edelens' confronting neighbor, Shelley Lowenstein. Exhibits 52(d) and 53(d) are some of the many photos taken by Ms. Lowenstein depicting cars trying to negotiate an exit from the subject site's driveway 10/1/10 Tr. 222-223.



The problem begins with the narrowness of the lanes on Connecticut Avenue, northbound, adjacent to the subject site, and is exacerbated by heavy traffic, the existence of a median in the middle of Connecticut Avenue, the width of the access driveway, its gate, the masonry pillars outlining the driveway and a telephone pole just north of the driveway. These difficulties were referred to in the testimony of numerous witnesses. For example, Reverend Tom Jones, who lives

on the northeast corner of Connecticut Avenue and Raymond Street (*i.e.*, just to the north of the subject site, across Raymond Street), testified (10/1/10 Tr. 178-185):

When we try to get out of our driveway, more and more often we cannot, because of the problems, the traffic on the street. And even after waiting so long, though, after getting out, more and more often it is true that the, that Connecticut Avenue is jammed up, often going both directions. And so sometimes a car will pull over, pull up. So you wait a long time for a light, and you still can't make it.

My point is, that it really is getting more and more congested, and we think, more and more dangerous. And respectfully, I would like to try to illustrate what I see as some of the already chaotic traffic conditions, and why it is my deep conviction that the proposed daycare center in the Edelen residence will make already chaotic traffic conditions most unbearable.

Some of the facts to be considered, that -- I don't think this has been mentioned yet, that Connecticut Avenue has a middle of the road median; that there is absolutely no way to make a left turn, for anybody coming from the north, to make a left turn into the residence.

And so the other reality is the narrowness of Connecticut Avenue at this point. As I, through the years, when I recall that it was almost two lanes at one time. Now they've made three lanes there. And so -- but they are very narrow lanes. They are so narrow that a public bus has to straddle two lanes.

* * *

-- any parents who are delivering children who come in from the north, how do you get there? You cannot, there is no left turn at Raymond. There's no left turn or no U-turn at Bradley.⁶

So one option would be to come down to Quincy Street, make a U-turn, wait, holding up traffic while you wait for this to be clear, make the U-turn, but then you've got to get to the right hand turn pretty quickly if you're going to make a turn into the proposed daycare center.

* * *

THE WITNESS: -- the site entrance, is very, very difficult. Just Monday of this week I was coming home. I was in the right hand lane, because I have to be there to get to my house.

MR. GROSSMAN: Yes.

THE WITNESS: And all of the sudden, the car in front of me stopped suddenly, without a turn signal. It was a Virginia car, to make a turn in here. I stopped

⁶ To make matters worse, there are no dedicated left turn lanes on Connecticut Avenue within six blocks of the Edelens' property, according to Petitioners' own Traffic expert, Carl Starkey. 10/1/10 Tr. 260.

suddenly. The cars behind me stopped suddenly. And we had to wait while the car made that entrance into the site.

It's always, it has been pointed out, there is the driveway is diminished by the pedestrians. So anybody that's getting in, a pedestrian, also is in that kind of thing. The same, or even more is true when you're coming, making the exit from the site, because right here, nobody has pointed out, there is a huge electric utility pole.

MR. GROSSMAN: Right here being exactly where?

THE WITNESS: As you come out on the right hand side of the driveway, right at Connecticut Avenue.

MR. GROSSMAN: Okay.

THE WITNESS: So there is no way ever to make -- you've got to make it. I dare anybody to try to turn right from there and stay in the right hand lane.

MR. GROSSMAN: Okay.

THE WITNESS: You really do have to use two lanes to do that. [Emphasis added.]

As explained by traffic engineer, Joseph Cutro (10/1/10 Tr. 338-345): ⁷

The combination of the physical, the width -- the width of the throat itself [of the site driveway] and the fact that the way people actually drive in real life, behaviorally, is, it just doesn't let that work as a two-way driveway. As a matter of fact, I'd be, I'd actually be, I say bold enough to say that I don't think anybody in this room has ever seen or ever will see two vehicles passing each other in that driveway.

* * *

But basically, what Park and Planning staff has told us is that since the width of a vehicle is seven feet wide, the driveway is adequate to pass two directions of travel, and that's just not the way driveways work.

* * *

Q Well, is the fact that the lanes are only nine feet wide on Connecticut Avenue, does that play into the dynamics of cars exiting the driveway?

A Very much so.

Q Could you explain how?

A The nine foot lanes complicate things from a number of standpoints. First of all, just the nine foot lane itself, the vehicle approaching northbound is geometrically restrained from getting into the driveway. The vehicle has to come to a, basically to a dead stop, can make, can make the turn. But probably, for many types of vehicles, particularly the larger SUVs and things like that, probably not without encroaching into the next lane to the left.

⁷ Petitioners' co-counsel, David Freishtat, moved to strike Mr. Cutro's testimony as not relevant under the controlling case law. 10/1/10 Tr. 366-369 and 10/4/10 Tr. 102-113. The Hearing Examiner disagrees and denies that motion for reasons that will be explained in Part III of this Opinion.

Departing the driveway, the problem is clearly complicated by the fact that you're potentially holding a vehicle up in the northbound lane. But not only that, the vehicle coming out of the driveway, the motorist coming out of the driveway not only has to look in the right-most lane but also has to know what's going on the center lane because the vehicle turning out of the driveway is going to need to encroach into that center lane to make a turn onto northbound Connecticut.

Q And is the amount that it would need to encroach into that center lane a function of how it leaves the driveway, whether it comes out along the right side of the driveway -

A That's one function --

Q -- or comes out the middle of the driveway?

A Right. Exactly. So, the further the vehicle can basically swing out and improve its own turning radius, if you will, the further the vehicle can swing out, the better, the better it's going to be able to encroach less. It also has to do with vehicle design. That's another factor as well. The larger vehicle is obviously having the most problems.

Q Okay. And you've used a term in conversation you called subtending. Can you explain what that is?

A Okay. Subtending is the effect of what happens when a vehicle makes a turn into, attempting to turn it -- it's, the vehicle, when a vehicle turns in a very short space, the vehicle is still at an angle relative to its straight-line path.

So, when a vehicle turns in from Connecticut Avenue or, or from the driveway, the vehicle is still, the wall, or the, sorry, the gate I should say is only twelve feet from the curb line, the east curb line on Connecticut Avenue. The vehicle can't straighten itself out that quickly. So, the vehicle is still going to be at an angle relative to the gate and the driveway. And that angle of the vehicle will be wider than the normal vehicle track of seven feet.

Q So, as I understand, if two cars are passing each other straight on, they take up less space --

A Exactly.

Q -- than if one of them is turning --

A Exactly.

Q -- with an arc.

A The vehicles are still in the process of turning as they pass through that gate. So, this speaks, again, to the inadequacy of the, of the, the inadequacy of the opening there . . .

* * *

MR. GROSSMAN: . . . so you said that you can't, as a practical matter, have two vehicles, one going out of the site and the other one coming into the site, at the same time.

THE WITNESS: Not in that driveway.

MR. GROSSMAN: That driveway. So, if people are coming north on Connecticut Avenue seeking to go into the driveway, and there's already a car in it coming out, or for that matter one backed up going in, it won't be able to turn into the driveway, correct?

THE WITNESS: That's correct.

MR. GROSSMAN: And what is the impact, in your professional opinion, on safety in that situation?

THE WITNESS: Well, that's going to vary by time of day. Under free-flowing traffic conditions, you have the higher speeds, but the lesser traffic. So, unless somebody is following too closely, it should probably be relatively safe. The peak hours are more worrisome, though, because, again, you have a very high density of traffic. Traffic is moving a little bit slower, typically, but at the same time we get very, very short gaps between vehicles. To me, it would be very, very worrisome of a rear-end collision potential. [Emphasis added.]

Petitioners themselves did not dispute that cars cannot simultaneously exit and enter the driveway as presently configured. When asked by the Hearing Examiner whether cars coming north on Connecticut Avenue to turn into the site had to wait for the people leaving the driveway before they could turn into the driveway, Mr. Edelen candidly admitted that was correct, although he added that the car stopped on Connecticut would facilitate the exiting car's turn by blocking oncoming traffic. 10/1/10 Tr. 114-115. The point is that the driveway configuration does not permit simultaneous entrance and exit, which of necessity will yield interference with traffic on Connecticut Avenue and a potentially dangerous condition.

This inability for cars to both enter and exit at the same time was also admitted by Petitioners' own traffic expert, Carl Starkey, on cross-examination (10/1/10 Tr. 265-266):

Q All right. Let me, when a car would be leaving the site to head north, would a driver normally come within six inches of that pillar on the north, or do they tend to center themselves on the driveway because they're leaving the site, as shown in the pictures that Ms. Lowenstein took?

A I would imagine they would tend to center themselves.

Q Okay. And because there is a masonry, solid wall, they wouldn't be able to see if a parent was coming from the south until they actually got out by the sidewalk. Is that fair to say?

A Until they passed the walkway.

Q Okay. So, if they're centering themselves, then a car entering from the south wouldn't have enough room to enter the site.

A And as I testified, that's what I observed.

Q Well, you testified they didn't enter the site, but now you're saying that they wouldn't be able to enter the site?

A Well, no, that's, that's different and I -- if they took up the center, no, they would not be able to enter.

It was suggested at the hearing that removing the pedestrian portion of the entry gate might solve this problem. Mr. Starkey testified that, in his opinion, it would. 10/1/10 Tr. 270-271.

However, Mr. Cutro, disagreed (10/1/10 Tr. 359-360):

MR. GROSSMAN: Going back to the gate on the existing driveway. There has been some suggestion that that, the gate has been narrowed for vehicular traffic because there's a portion of it that is devoted --

THE WITNESS: To pedestrians.

MR. GROSSMAN: -- to pedestrian traffic. If that were eliminated, would that render the site access safe and efficient for vehicular and pedestrian travel?

THE WITNESS: It would help, but it's not enough. The particular, the geometrics of that driveway, the gate is still very close to Connecticut Avenue. I believe, to make that individual entrance alone adequate, you would probably have to have a width clear of, say, pillars of 22 to 24 feet.

MR. GROSSMAN: Okay. So, if they took out, moved a pillar or took out a piece of their wall, or whatever --

THE WITNESS: And the gate, and the pedestrian gate would have to go. Or be, be relocated. [Emphasis added.]

There was some testimony which suggested that the anticipated traffic and access difficulties were being exaggerated. Mr. Edelen testified that "the parents are very conscientious. They are cautious as they drive. They know that there are children in and around." 10/1/10 Tr. 120. He also noted that his wife doesn't encourage parents to linger in the drop off phase; however, he indicated that each drop off takes "five to seven minutes." 10/1/10 Tr. 120. That may seem like a short period of time to Mr. Edelen, but to the Hearing Examiner it means that multiple cars will be trying to maneuver on the site into and out of parking spaces and narrow drive aisles. Mr. Edelen did indicate that Petitioners would monitor the parking situation and assist as necessary, but he also admitted that it was "not in our plan" to have someone out in the parking lot during arrival or departure hours to supervise traffic. 10/1/10 Tr. 159-160.

There was also testimony from Leslie Caldicott, a former neighbor of the Edelens, who lived next door for almost two years. She stated that "although the traffic is very heavy, at no time did I see any problems with cars coming and going out of the driveway next door specifically, parking on or

around Connecticut Avenue or on Raymond Street, or any negative traffic issues, people coming and going from the school next door.” 10/1/10 Tr. 95. While Ms. Caldicott’s testimony may have some bearing concerning the current operation, her testimony in no way establishes that the proposed increase in the use could be safely handled with the planned configuration on this site.

Maggie Zimmerman, a crossing guard employed by the Montgomery County Police Department, testified she is the morning and afternoon crossing guard at the intersection of Raymond, Rosemary and Connecticut Avenue, just north of the subject site, and has been working that intersection for the past eight years, every school day from 8:20 to 8:50 and 3:00 to 3:30 (10/1/10 Tr. 58-59):

As the crossing guard, I have noticed the following traffic patterns during the morning rush hour. Raymond and Rosemary are very busy streets with most of the traffic heading west toward the school and Bethesda. Because the traffic is so heavy heading west, there is very little eastbound traffic on Rosemary/Raymond. Really, that's Raymond. Cars frequently make a left turn onto Rosemary from northbound Connecticut, or a U-turn. I am situated on the north side of the intersection, and these turns are safe and pose no danger to the children crossing the street.

I have observed cars coming in and out of 6705 Connecticut during the time I am there, and they appear to move in and out of the driveway in an orderly manner, with no traffic disruptions. Sometimes cars will pull over to the left land to make a U-turn at the Rosemary intersection. I have not noticed any abrupt or risky movements that would create safety concerns.

Northbound traffic on Connecticut Avenue is heavy, however, the traffic light cycles at Bradley Boulevard are sufficient to create gaps, especially in front of 6705, allowing for plenty of time for cars to pull in or out without disrupting traffic flow. [Emphasis added.]

The Hearing Examiner credits Ms. Zimmerman’s testimony, as an objective witness; the problem is, she is not present when the situation is worst in front of the subject site – during the evening rush hour, as pointed out by another community witness, Jeffrey Benson. 10/1/10 Tr. 312. That is when northbound traffic is heaviest on Connecticut Avenue.

Moreover, evidence introduced by Mr. Cutro indicates that there have been thirteen accidents northbound on Connecticut between Bradley Lane and Raymond Street (*i.e.*, in the single block in front of the Petitioners' home) in the five year period, from 2006 to 2010. One of those accidents involved a vehicle attempting to exit the driveway of the Edelens' property on June 2, 2010, as evidenced by the police report (Exhibit 64). 10/1/10 Tr. 332-334. Adding additional vehicles to the ones currently attempting to turn into the Edelen property while others are trying to exit cannot help but aggravate this hazard.

In sum, it appears from the evidence that the site conditions in this case will create a “perfect storm” of vehicle movement issues – narrow entrance/exit area for two-way traffic; large masonry pillars which cause people to shy away and center themselves in the driveway; presence of a utility pole north of the exit requiring exiting cars to make a wide turn onto Connecticut Avenue; narrow on-site drive aisles; narrow parking spaces; crowded stacked parking; narrow lanes on Connecticut Avenue northbound at this area; and high traffic volume on Connecticut Avenue during the evening rush hour. The likely result of this unusual site condition will be cars backed up onto Connecticut Avenue awaiting entrance onto the subject site and cars stopping short and/or trying to get around the stopped cars waiting to enter the site. This dangerous situation cannot be sufficiently ameliorated by Petitioner's offer to remove the post which separates the pedestrian and vehicular gates or to employ a sliding gate. These changes would help, but the totality of the problem is too large to be resolved by just the proposed gate changes.

There is one change that might sufficiently alleviate the safety concerns – the addition of a separate driveway entrance at the southern end of the property, which would allow vehicles to exit the site from the northern driveway without interfering with vehicles entering through the, as yet non-

existent, southern driveway. This possibility was raised at the hearing during the cross examination of Stephen Edelen, and the following colloquy occurred (10/1/10 Tr. 167):

Q Okay. Have you proposed to add an extra curb cut so that you would have one-way circulation through the property?

A Over a year ago we looked into whether or not it would be beneficial for us cosmetically and as a property value question, whether we would get a second entrance at the south side of our lot. We proceeded to get a permit from the State Highway Administration who was aware at the time that we had -- as far as we know, they were aware of our existing daycare. We didn't do this for our daycare. This was really something for our own personal use.

And subsequently, we got permits from Chevy Chase section 3 to allow that driveway entrance to exist. And sometime -- it expired. The permit from State Highway Authority expired, and we are not pursuing it. We never acted on it. We decided that once we were going to do this, we didn't really see a reason for it. We preferred the screening. We preferred that it would be better to have a lot of screening of our parking areas, and privacy, that that would be more of a benefit to the public.

* * *

Given Petitioners' decision not to pursue the second driveway entrance, and the danger that the evidence establishes would occur if the use were increased as proposed under the current driveway system, the Hearing Examiner finds that there are unusual site conditions in this case, and Petitioners have failed to establish that the proposed development will not reduce the safety of vehicular or pedestrian traffic, as required by Zoning Ordinance §59-G-1.21(a)(9)(C).

4. Request for Parking Setback and Drive-Aisle Width Waivers:

Petitioners have requested waivers of the required drive-way width and parking setbacks specified in Zoning Ordinance §§59-E-2.41 and 2.83(b), respectively. Before reaching the merits of those waiver requests, the Hearing Examiner must examine a threshold issue he raised, *sua sponte*, at the hearing 10/1/10 Tr. 13 -- whether the Hearing Examiner has the authority under Zoning Ordinance §59-E-4.5 to grant any parking waivers.

Zoning Ordinance §59-E-4.5 provides:

The Director, Planning Board, or Board of Appeals may waive any requirement in this Article not necessary to accomplish the objectives in Section 59-E-4.2, and in conjunction with reductions may adopt reasonable requirements above the minimum standards. Any request for a waiver under this Section must be referred to all adjoining property owners and affected citizen associations for comment before a decision on the requested waiver. [Emphasis added.]

By its terms, this provision does not grant authority to the Hearing Examiner to waive any and all provision of Article 59-E. Such general authority is granted only to the “Director [of the Department of Permitting Services], Planning Board, or Board of Appeals.”

The parties addressed this issue on the second day of the hearing 10/4/10 Tr. 114-120. Petitioners argued that the Hearing Examiner’s authority to grant the waiver is implied by Zoning Ordinance §59-G-2.13.1, which gives the Hearing Examiner authority to grant the special exception in question. The opposition argued that no such authority is granted, and that when the Council wanted to give the Hearing Examiner specific authority, as it did in §59-G-1.21(a)(9)(C) with regard to safety of vehicular and pedestrian traffic, it expressly so stated.

The Hearing Examiner must start with the proposition that administrative agencies, such as the Hearing Examiner, have only such authority as is granted them by statute. As stated by the Maryland Court of Appeals in *Holy Cross Hospital, Inc. v. Health Services Cost Review Com.*, 283 Md. 677, 683, 393 A.2d 181, 184 (1978), “It is elementary that since an administrative agency, such as the Commission, is a creature of statute, it has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute.”

In the subject case, it is clear that the Hearing Examiner has been granted the authority to grant or deny the special exception in question, pursuant to Zoning Ordinance §59-G-2.13.1(a), which provides, in relevant part, “*The Hearing Examiner may approve a child day care facility for a maximum of 30 children . . .*” Subsection (a)(2) of that provision allows the Hearing Examiner to

waive only that portion of §E-3-7 which pertains to the number of parking spaces, not their setbacks, nor the width of the drive aisles. As specified in §59-G-2.13.1(a)(2), “*The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in Section 59-E-3.7 is not necessary . . .*”

Given the fact that the Council did not include the Hearing Examiner in the list of those bodies authorized in Zoning Ordinance §59-E-4.5 to grant waivers of any provision of that Article and that the Council very specifically limited the Hearing Examiner’s authority with respect to waiving requirements of §59-E-3.7 to those provisions pertaining to the number of required spaces, the Hearing Examiner finds no authority to grant the waivers requested.⁸

Even if the Hearing Examiner did have the authority to grant the waivers, he would not be inclined to grant the waiver of the driveway aisle width requirement, which is 20 feet for a two-way drive aisle. The relevant provision, Zoning Ordinance §59-E-2.41, provides:

59-E-2.41. Driveways.

- (a) Interior aisles are vehicular travelways with parking stalls along the sides.
- (b) Entrance and exit driveways are vehicular travelways, without parking stalls along the sides.

Driveways for one-way movements shall be at least 10 feet in width to allow safe and expeditious movement of vehicles. Entrance and exit driveways shall be separately provided wherever possible. If entrance and exit driveways are combined, the combined driveway shall be not less than 20 feet in width. Aisles designed to accommodate one-way movements shall have the following minimum widths based on the configuration of the adjacent parking spaces: Perpendicular, 20 feet; 60 to 75 degrees, 18 feet; 45 to 59 degrees, 16 feet; parallel, 10 feet. Aisles designed to accommodate 2-way movements shall have a minimum width of 20 feet.

For the reasons discussed in the previous section, it is the narrowness of the drive aisles that creates part of the safety problem in this case. With cars parked along the sides of the drive aisle, as

⁸ In other cases calling for a special exception decision by the Hearing Examiner and not the Board of Appeals, the Planning Board should consider granting or denying any parking waiver requests as part of its review, instead of merely making recommendations in that regard. Nevertheless, the Hearing Examiner has informed Council legal staff that it should consider a Zoning Text Amendment to clarify this situation and another similar problem in Zoning Ordinance §59-G-1.21(a)9(B).

depicted in the portion of the revised site plan (Exhibit 75(a)) reproduced on page 23 of this Opinion, there will be barely enough room for one car to get by, let alone enough room for cars to maneuver in and out of the parking spaces while other cars are trying to pass. The result is sure to be backups waiting to get into parking spaces and out of the exit, with concomitant backups along Connecticut Avenue. Based on the evidence received at the hearing, as discussed above, this parking plan is neither workable, nor consistent with safety considerations. Allowing a waiver of the drive aisle minimums would put the government's imprimatur on an unworkable and ultimately dangerous parking/drive aisle configuration. It certainly would not improve the situation which results in the Hearing Examiner's decision to deny this special exception petition.

The other requested waiver concerns parking setbacks, which are set forth in Zoning Ordinance §59-E-2.83(b). That section provides:

59-E-2.83. Parking and Loading facilities for special exception uses in residential zones.

This Section applies to an off-street parking facility for a special exception use that is located in a one-family residential zone if 3 or more parking spaces are provided. These standards are intended to mitigate potential adverse visual, noise, and environmental impacts of parking facilities on adjacent properties. In addition, these requirements improve the compatibility and attractiveness of parking facilities, promote pedestrian-friendly streets, and provide relief from un-shaded paved areas.

* * *

(b) Setbacks. Each parking and loading facility, including each entrance and exit driveway, must be set back a distance not less than the applicable building front and rear yard and twice the building side yard required in the zone. The following additional setbacks must be provided for each parking facility:

(1) if 150 to 199 parking spaces are provided, the required side and rear parking facility setbacks must be increased by 5 feet;

(2) if 200 or more parking spaces are provided, the required side and rear parking facility setbacks must be increased by 10 feet.

* * *

If there were a workable parking plan for this site and authority to grant this waiver, the Hearing Examiner would be inclined to do so because the statute recites the regulation's purpose as intending "to mitigate potential adverse visual, noise, and environmental impacts of parking facilities

on adjacent properties,” and there is more than adequate screening on the site to provide the needed mitigation.

In any event, based on the Hearing Examiner’s legal conclusion that he is without authority to grant the waiver requests, he declines to do so.

E. Community Reaction

The proposed special exception has generated both support and opposition in the community. As mentioned in Part I of this Opinion, there were five pre-hearing letters of support from the community (Exhibits 17, 18, 19, 22(q) and 28) and thirteen pre-hearing letters in opposition from the community (Exhibits 15, 21, 24(a), 25, 29, 30, 31, 33, 34 and 36 to 39).⁹ Among the opposition letters were submissions from three incorporated municipalities – the Village of Chevy Chase, Section 3, the town in which the subject site is located (Exhibit 24(a)); Chevy Chase Village, a neighboring jurisdiction to the south (Exhibit 25); and the Town of Chevy Chase, a neighboring jurisdiction to the west (Exhibit 21). Community concerns mostly arise from the transportation issues discussed in the previous section of this Opinion, but there were also expressions of concern about the current noise and the potential for increased noise from the proposed use. 10/1/10 Tr. 83, 88 and 10/4/10 Tr. 28, 95-98.

As to the noise issue, the Hearing Examiner finds, as counsel for VCC-3 conceded (10/ 4/10 Tr. 147), child generated noise from a day care facility is an inherent adverse effect. Moreover, in this case, given the size of the play area, the amount of screening, and the staggered outdoor play times, it should not result in an undue imposition upon the community. That was the conclusion of Technical Staff (Exhibit 20, pp. 9 and 12), and the Hearing Examiner agrees, especially given the staggered outdoor play times proposed by Petitioners. Statement of Operations (Exhibit 75(c), ¶F.1).

⁹ Some additional opposition letters were attached to the Technical Staff report (Exhibit 20), and still more letters were filed at the hearing.

The transportation safety concerns are an entirely different kind of problem. At the hearing, the overwhelming majority of community participants testifying opposed the petition, including the Village Manager and Council Chair of the Village of Chevy Chase, Section 3 and the Mayor of the Town of Chevy Chase. However, we often observe that the decision on a zoning matter “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance.

Nevertheless, the fact that zoning matters are not plebiscites does not mean that we ignore the relevant evidence produced by the community, and in this case the community produced ample evidence that because of the unusual site conditions, the proposal would create an unsafe condition for pedestrian and vehicular traffic, which cannot be remedied by the changes offered by Petitioner, as discussed at length in Part II.D.3. of this Opinion.

While the Hearing Examiner has no doubt about the good intentions of the Petitioners, sometimes good intentions are not enough. The access to this site, as presently configured or as configured under the final site plan, would present a clear danger to users and those traversing Connecticut Avenue in front of the site, if the use were expanded as proposed.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable

general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with certain conditions. Exhibit 20. The Planning Board more tentatively recommended conditional approval, suggesting a follow-up hearing in nine months to assess the adverse traffic effects. Exhibits 23.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition, while meeting most of the applicable standards, fails to meet crucial standards regarding safety. The Hearing Examiner therefore denies the petition.

A. Standard for Evaluation

The standard for evaluation prescribed in Zoning Ordinance §59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Section 59-G-1.2.1 provides:

59-G-1.2.1. Standard for evaluation.

A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception. [Emphasis added.]

As stated in §59-G-1.2.1, inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Inherent adverse effects, alone, are not a sufficient basis for denial of a special

exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.”

[Emphasis added.] *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics of the proposed “Chevy Chase Reggio” day care facility that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 20, p. 13):

- (1) vehicular trips to and from the site;
- (2) outdoor play areas;
- (3) noise generated by children;
- (4) drop-off and pick-up areas; and
- (5) lighting

To this list, the Hearing Examiner would add the need for parking spaces, in accordance with Zoning Ordinance §59-E-3.7.

Technical Staff concluded “There are no non-inherent effects of the use.” Exhibit 20, p. 13.

As stated by Staff,

Staff understands that the interior area devoted to the child care facility is approximately 1,500 square feet and located in the basement of the existing three-story single-family dwelling. There are no significant traffic impacts that would result from the proposed special exception. The plan provides adequate parking to serve the use. The large driveway and parking layout serves as drop-off and pick-up area for children. Existing lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added. There will be no changes to the existing dwelling and parking area in front of the dwelling, or play area in the rear yard. The front and rear yards are well landscaped with mature trees. Trees, flowers and shrubbery are located in the front, side and rear of the dwelling. There are no non-inherent effects of the use.

The Hearing Examiner agrees with some of Staff’s conclusions (*i.e.*, those regarding the adequacy of screening, the level of lighting and the adequacy, in general, of area-wide transportation facilities); however, the evidence adduced at the hearing does not support the conclusion that there is adequate on-site parking (in its proposed configuration) or that there are no significant traffic impacts (in terms of safety), as discussed at length in Part II. D. of this Opinion. Moreover, the Hearing Examiner finds that the unusual site conditions discussed in Part II. D. are non-inherent characteristics of the site.

Although some of Petitioner’s neighbors have also expressed concerns about the potential for increased noise, the adverse effect of child-created noise is largely inherent in the operation of this type of facility, as discussed in Part II. E. of this Opinion, and the Council elected to permit this type of use in this Zone. If this special exception were to be granted, conditions would be imposed to minimize the effects of noise from the facility, such as prohibitions against amplified sound outdoors and staggered play times, as agreed to by Petitioners. There is already adequate screening of the facility, as noted by Staff.

With regard to the transportation issues, Petitioners' counsel, David Freishtat, argued that under the case law (*Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981) and *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995)), Mr. Cutro's testimony should not be considered since it is premised, at least in part, on "quality of life" issues, not the issues properly before this body. 10/1/10 Tr. 366-369 10/4/10 Tr. 102-113. The Hearing Examiner recognizes that Mr. Cutro's use of the term, "quality of life issues" may be a poor choice of labels, but the Hearing Examiner is not deterred by his terminology, for his testimony went to much more than amorphous "quality of life" issues. Rather his testimony directly implicates compatibility of the proposed use and, most importantly, the impact of the proposed use on safety of vehicular and pedestrian traffic. Both of those issues are legitimate areas of inquiry for the Hearing Examiner. Indeed, Mr. Cutro's testimony was based on the unusual site conditions, with regard to internal circulation on the site, the size and configuration of the driveway entrance/exit and its interface with the only road the site accesses, Connecticut Avenue northbound, at its narrowest point.

The Hearing Examiner must review the proposed operation, at the proposed site, to see whether it is compatible with the neighboring uses, and cannot grant the use "*if at the particular location proposed* they have an adverse effect above and beyond that ordinarily associated with such uses." *Mossburg v. Montgomery County*, 107 Md. App. at 8, 666 A.2d at 1257 (quoting *Schultz v. Pritts*, 291 Md. at 21-22, 432 A.2d at 1330) [Emphasis in original.]. To the same effect is the Court of Appeals' decision in *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 105, 956 A.2d 166, 197 (2008). In fact, the presumption of compatibility does not override the Hearing Examiner's authority:

The inherent effects notwithstanding, the legislative determination necessarily is that the uses conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the body to whom

the power to grant or deny individual applications is given that actual incompatibility would occur.

Loyola College, 406 Md. at 106, 956 A.2d at 197-198;

In the case at bar, the unusual site conditions discussed at length in Part II. D. of this Opinion demonstrate that there is a narrow entrance/exit area for two-way traffic; there are large masonry pillars which cause people to shy away and center themselves in the driveway; there is a utility pole north of the exit requiring exiting cars to make a wide turn onto Connecticut Avenue; there are narrow on-site drive aisles, narrow parking spaces and a crowded stacked parking area; there are very narrow lanes on Connecticut Avenue northbound at this area; and there is high traffic volume on Connecticut Avenue during the evening rush hour. The likely result of this unusual site condition will be cars backed up onto Connecticut Avenue awaiting entrance onto the subject site and cars stopping short and/or trying to get around the stopped cars waiting to enter the site. This dangerous situation cannot be sufficiently ameliorated by Petitioner's offer to remove the post which separates the pedestrian and vehicular gates or to employ a sliding gate.

Under Zoning Ordinance §59-G-1.21(c),

The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Petitioners have failed to meet this burden as it pertains to the showing required in Zoning Ordinance §59-G-1.21(9)(C):

(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

For the same reasons relating to the proposed parking configuration and traffic safety issues discussed in Part II. D. of this Opinion, Petitioners have failed to make the showing required in Zoning

Ordinance §59-G-2.13.1(a)(5), that

(5) the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity.

These parking configuration and traffic safety issues also affect the Hearing Examiner's findings with regard to other special and general retirements, as discussed in Parts III. B. and C. below.

The Hearing Examiner considered permitting the special exception with a condition that it could not be implemented unless an additional curb cut was made and a circular driveway installed allowing a separate entrance and exit; however the teachings of *Concerned Citizens v. Constellation-Potomac*, 122 Md.App. 700, 762, 716 A.2d 353, 383 (1998), suggest that such a condition would be inappropriate.

In *Concerned Citizens*, the Maryland Court of Special Appeals took the Board of Appeals to task for, *inter alia*, approving a special exception, even though the Board appeared not to be satisfied with the landscaping plan, and had imposed a condition allowing a revised plan to be filed, following discussions with the neighbors and approvals of other agencies. The court stated (122 Md.App. at 762, 716 A.2d at 383):

If the Board concluded that Constellation's evolved landscaping plan did not satisfy the minimum requirements of the Zoning Ordinance for approval of a special exception, the Board either should have denied the petition, or, pursuant to section 59-A-4.24, requested Constellation to revise its petition before closing the record.

In the subject case, the testimony of Petitioner Stephen Edelen, quoted on page 35 of this Opinion, made it clear that he had decided not to go forward with installing a second entrance and a circular drive. In additional testimony on the point, Mr. Edelen cast doubt on whether the state would approve the necessary curb cut if Petitioners did reapply, and he suggested that the state highway authority felt it might not improve the traffic situation. 10/1/10 Tr. 167-169.

On this record, the Hearing Examiner cannot approve the special exception with a condition for installation of a second access way and a circular drive.

The Hearing Examiner also rejects the suggestion by the Planning Board that the special exception be approved, and that transportation issues be addressed by conducting a review after nine months of operations. Exhibit 23. This solution might be appropriate if the concern were merely traffic volume, but that is not the nub of this problem as presented by the testimony at the public hearing; the major issue here is safety, and the Hearing Examiner does not feel that approval of what appears to be a dangerous situation can be justified by a nine-month review. In nine months, we could have some serious injuries or worse.

It appears from the Planning Board's letter of July 8, 2010 (Exhibit 23), that the presentation before the Planning Board was much more focused on non-safety transportation impacts, such as traffic volume on side streets and parking on neighborhood streets, not on the safety issues which played such a big part in the testimony before the Hearing Examiner.

In sum, based on a review of the entire record, the Hearing Examiner finds that the unusual site conditions create non-inherent adverse effects above and beyond that ordinarily associated with such uses (*i.e.*, a dangerous traffic situation in and around the site), which require denial of the petition.

B. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, together with the written evidence and testimony, demonstrate that some, but not all, of the specific standards would be satisfied with regard to in this case, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

- (1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The revised Site Plan (Exhibit 75(a)) and Landscape and Lighting Plan (Exhibit 5) satisfy this requirement.

- (2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*
 - (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
 - (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Zoning Ordinance §59-E-3.7, provides that a child day care center must provide one space for every non-resident staff member in addition to the parking required for the residence, plus adequate parking for discharge and pick up of children. The Code provides that the average drop off and pick up space required is one space for every six children, although waivers and variances are allowed in accordance with the Zoning Ordinance.

Technical Staff calculated that a child day care facility for 24 children must provide a minimum of 8 parking spaces: one space for each of the two non-resident staff members, two spaces for the residence, and four spaces for the children's parents. Exhibit 20, p. 10. For the reasons discussed in Part II. D. 2. of this Opinion, the Hearing Examiner finds that the parking configuration presently proposed is not workable and therefore does not satisfy the requirements of this section, although the number of parking spaces proposed would meet the statutory requirement.

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: For the reasons discussed in Part II. D. 2. of this Opinion, the Hearing Examiner finds that the parking configuration presently proposed is not workable and therefore does not satisfy the requirements of this section.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 40).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As previously discussed, the anticipated noise from the facility would be inherent in the use, and the screening and staggered outdoor play plan would avoid an inordinate adverse effect due to noise.

However, the evidence also demonstrates that the proposed use would result in a nuisance because of traffic safety and parking issues, for the reasons discussed in Part II. D. and IV. A. of this Opinion. Based on these factors, the Hearing Examiner finds that the use will be not be compatible with surrounding uses.

(b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

(c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, together with the written evidence and testimony, demonstrate that some, but not all, of the general standards would be satisfied with regard to in this case, as outlined below.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A child day care center use is a permissible special exception in the R-60 Zone, pursuant to Code §59-C-1.31(d).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with some but not all of the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B., above.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject site is within the area covered by the Bethesda Chevy Chase Master Plan,

approved and adopted in 1990. For all the reasons set forth in Part II. C. of this Opinion, the Hearing Examiner finds that the proposed use is consistent with the objectives and recommendations of the Bethesda Chevy Chase Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The proposed child day care center will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. The rear yard play area is completely fenced in. However, the parking and traffic safety issues discussed above will create compatibility issues. There is not an excess of similar uses. Technical Staff also determined that the proposed use “will be served by adequate public services and facilities.” Exhibit 20, p. 15. The Hearing Examiner so finds.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will impact the peaceful enjoyment of surrounding properties at the site because of the parking and traffic safety issues discussed above.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception will cause only such noise as is inherent in this type of use, wherever it might be located in this zone. Technical Staff found that existing lighting on the property is adequate and consistent with the residential character of the neighborhood. Exhibit 20, pp. 11-12. The Hearing Examiner therefore finds that there will not be objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site as a result of the special exception, except as noted with regard to parking and traffic safety.

(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Technical Staff reports that there are no similar special exceptions within the neighborhood. A special exception for an accessory apartment was approved in 1984 at 3815 Bradley Lane. Exhibit 20, p. 4. Therefore, the Hearing Examiner finds that the child day care center proposed in this case would not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed child day care center would provide a needed service to the public; however, for the reasons previously discussed, its parking configuration and traffic issues would create a danger to public health and safety of residents, visitors or workers in the area of the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that the proposed use “[w]ill be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.” Exhibit 20, p. 15.

There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, under the terms of the §59-G-1.21(a)(9)(B), “the Board of Appeals must determine the adequacy of public facilities,” including Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (“PAMR”). Of course, the instant case is one that, by statute, is decided by the Hearing Examiner and not the Board of Appeals. Zoning Ordinance §59-G-2.13.1(a). Opposition

counsel pointed out, in the context of a legal argument on the Hearing Examiner's authority to grant parking waivers under Zoning Ordinance §59-E-4.5, that Zoning Ordinance §59-G-1.21(a)(9)(B) does not expressly grant the Hearing Examiner authority to make the decision regarding the adequacy of public facilities when subdivision is not required. 10/4/10 Tr. 114-120. Only the Board of Appeal is expressly granted that authority in §59-G-1.21(a)(9)(B). The statutory failure to empower the Hearing Examiner in this section would be problematic, as it was regarding parking waivers discussed in Part II. D. 4 of this Opinion, if it were not for the fact that the last sentence in §59-G-1.21(a)(4), requires the Board of Appeals "or Hearing Examiner" to make the public facilities evaluation. Given that language, the Hearing Examiner is empowered, and indeed required, to make that determination.

Technical Staff reviewed the issues related to the adequacy of public facilities and found that both LATR and PAMR are satisfied, as discussed in Part II. D. 1. of this Opinion. For the reasons set forth in Part II. D. 1. of this Opinion and Decision, the Hearing Examiner agrees with their conclusions and so finds.

(C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: Technical Staff found that the use as proposed "will not reduce the safety of vehicular or pedestrian traffic because the existing driveway and parking area is large enough to accommodate the drop-off and pick-up of children. The applicant will also stagger arrivals and departures." Exhibit 20, p. 16. For the reasons discussed at length in Part II. D. 3 of this Opinion, the Hearing Examiner disagrees and finds that the proposed use, as currently designed, would significantly reduce the safety of vehicular and pedestrian traffic due to the unusual site conditions.

D. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-60 Zone, which permits the proposed use by special exception. According to Technical Staff (Exhibit 20, p. 10), “The proposal conforms to all applicable development standards of the R-60 zone.” The following table from page 10 of the Staff report lists the applicable standards and the existing measurements for the subject site:

Development Standard	Required	Proposed/Existing
Minimum Lot Area	6,000 sq. ft.	21,780 sq. ft.
Minimum Lot width:		
▪ at front building line	60 feet	104 ft.
▪ at street line	25 ft.	104 ft.
Minimum Building Setback:		
Front Yards	25 ft.	32 ft.
Side Yards		
▪ One side	8 ft.	19 ft.
▪ Sum of both sides	18 ft.	49 ft. approx.
Rear Yard	20 ft.	112 ft. approx.
Maximum Building Height	2 ½ stories or 35 ft	*3 stories
Maximum Building Coverage	35%	23% Approx.
Parking	8 parking spaces	11 parking spaces

*The height of the existing dwelling is a conforming building as per Section 59-A-5.44. (grandfather clause).

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a child day care center provide one parking space for every non-resident staff member, in addition to the residential parking requirement and space for the pickup and discharge of children. As noted in Part II. D. and elsewhere in this Opinion, the Hearing Examiner finds that Petitioners have proposed a sufficient number of parking spaces to meet the code requirements, but that the proposed configuration is unworkable.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
- (2) *Sand, gravel or clay pits, rock or stone quarries.*
- (3) *Sawmill.*
- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Riding stables.*
- (7) *Helipoint and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibit 20, p. 9). No trees will be removed.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must*

submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

(f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner has proposed a sign, which is depicted in Part II. B. of this Opinion. If this petition were to be granted, a condition would have been imposed providing that Petitioners could not display a sign for the childcare facility unless it was approved by the Department of Permitting Services and a permit obtained therefor. A sign in this residential zone should not exceed two square feet, and may not be lighted. A copy a sign permit must be filed with OZAH before any sign is posted.

(g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

(h) **Lighting in residential zones.** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that (Exhibit 20, p 11-12):

There are no additional external lighting changes proposed. The existing exterior illumination consists of residential type fixtures that provide safety for cars, parents, and children entering and exiting the property. . . . The lighting currently in place does not cause any glare onto adjoining properties.

The Hearing Examiner therefore finds that there would not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioners fails to meet the specific and general requirements for the special exception, and that the Petition must be denied.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 10-1 for a special exception in the R-60 Zone to operate a child day care center for up to 24 children in an existing single-family detached home, at 6705 Connecticut Avenue in Chevy Chase, Maryland, is hereby **DENIED**, as is the accompanying request for waivers of the required drive-aisle widths and parking setbacks.

Dated: November 23, 2010

Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: All Parties of Record